Supreme Court of the United States

OCTOBER TERM, 1969

No. 1289

HAZEL PALMER, et al., Petitioners,

vs.

ALLEN C. THOMPSON, MAYOR, CITY OF JACKSON, et al., Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Aug. 8, 1965—Complaint filed in United States District Court for the Southern District of Mississippi, Jackson Division.

Aug. 18, 1965—Defendants' Answer filed.

Aug. 18, 1965—Affidavits of George T. Kurts, a defendant, filed.

Aug. 18, 1965—Affidavit of W. D. Rayfield, a defendant, filed.

Aug. 19, 1965—Affidavit of Allen C. Thompson, a defendant, filed.

Aug. 18, 1965—Affidavit of Carolyn Stevens, a plaintiff, filed.

Sept. 15, 1965—Opinion of District Court, in letter form.

Sept. 18, 1965—Findings of fact and conclusions of law filed by District Court.

Sept. 18, 1965—Order of District Court denying plaintiffs' request for a temporary injunction.

Mar. 26, 1966—Stipulation by the parties agreeing that final judgment be entered without further hearing.

Mar. 26, 1966—Final judgment of District Court dismissing plaintiffs' complaint.

Apr. 11, 1966—Plaintiffs' notice of appeal to the Fifth Circuit Court of Appeals.

Aug. 29, 1967—Opinion and judgment of the Court of Appeals.

Oct. 25, 1967—Order of Court of Appeals granting rehearing, en banc.

Oct. 9, 1969—Judgment and opinion on rehearing of the Court of Appeals.

Nov. 23, 1969—Dissenting opinion on rehearing filed in Court of Appeals.

Jan. 7, 1970—Concurring opinion on rehearing filed in Court of Appeals.

United States of America

UNITED STATES DISTRICT COURT
for the Southern District of Mississippi

Hazel Palmer, et al.,

vs.

Allen C. Thompson, Mayor, City of Jackson, Missisippi, et al.

(Civil Action No. 3790)

(Filed August 18, 1961)

AFFIDAVIT OF CAROLYN STEVENS

County of Hinds,
State of Mississipii—ss.

Personally came and appeared before me, the undersigned authority in and for the County and State of aforesaid Carolyn Stevens, who after being duly sworn by me states upon her oath that:

1. That she is one of the plaintiffs in the above entitled cause.

2. That she is 26 years old and a citizen of the United States and a member of the Negro race and has been a resident of the City of Jackson, County of Hinds, for her entire life.

3. That she is the mother of two minor children ages four and two, who reside with her in the City of Jackson, County of Hinds, Missisippi. Said children are healthy, active and in need of adequate recreational facilities in

order to enjoy the benefits of a normal and healthy childhood.

4. That she is part owner of a certain parcel of real property located within the corporate limits of the City of Jackson upon which various real property taxes have been levied from time to time by public officials and used to defray the expenses of erecting and maintaining certain public facilities including parks in the City of Jackson, Mississippi.

5. That from December 1, 1945 and up until 1963 the City of Jackson, Mississippi by and through the Jackson Department of Parks and Recreation have owned, operated and maintained various public parks within the City of Jackson and at public expenses. These various parks include facilities for various public recreational activities including but without limitation golf, tennis, playgrounds and in particular swimming and wading facilities.

6. That these facilities and parks as of approximately 1960 included at least seven different park facilities and approximately 700 acres of park grounds within the corporate limits of the City of Jackson. Among the parks were the following: Livingston, Battlefield, Riverside, Leavell Woods, Commnuity Park, College Park and the Air Base Recreational facility, all of which except the last named includes wading pool or swimming pool.

7. A full description of each recreational facility referred to in the preceding paragraph appears in an official publication of the Jackson Department of Public Recreation of the City of Jackson. A copy of which is annexed hereto and marked affiant's Exhibit "A".

8. In 1962, the population of the City of Jackson was 150,000, 100,000 of whom were members of the white race and 50,000 of whom were members of the Negro race.

Between the years 1954 and 1963 and continuing up until the present time it was the stated and strict policy of the State of Mississippi and the City of Jackson and the respective officials and representatives to maintain and enforce segregation of the races with regard to creation, operation and use of public facilities including those public parks and swimming facilities hereinbefore referred to and described in Affiant's Exhibit "A".

9. As a part of the policy of racial segregation maintained and enforced by the City of Jackson with regard to swimming facilities, the Department of Parks and Recreation did prior to 1963 maintain separate parks and swimming pool, golf and auditorium facilities for Negroes which separate Negro facilities are identified and described by the City itself in Affiant's Exhibit "A".

10. During the year 1963, and particularly in May and June of that year Negro citizens of Jackson organized together for the purpose of presenting certain grievances of the Jackson Negro Community to the public authorities generally and to defendant Thompson as Mayor of Jackson in particular. A committee repreesntinng the Negro community met with defendant Thompson and City Commissioners D. L. Luckey and Tom Marshall on May 27, 1963 to present said grievances to Mayor Thompson and other City Officials. These grievances included a specific demand that the City of Jackson desegregate public facilities including public parks and swimming facilities.

11. Thereafter, and on various occasions, defendant Thompson stated and declared that the public policy of the City of Jackson was to continue segregation of the races with regard to use and operation of City facilities. Affiant has made a study of the newspaper accounts of defendant Thompson's statements regarding segregation of public facilities during the critical months of May and

June of 1963. Defendant Thompson's statements are catalogued in Affiant's Exhibit "B", and display an unequivocal intention on the part of the chief executive of the City of Jackson to prevent integration of the races at public facilities of the City of Jackson at whatever cost (See Affiant's Exhibit "B").

12. Thereafter and on or about May 30, 1963, defendant Thompson was reported as having announced, "Public swimming pools would not be opened on schedule this year due to some minor water difficulty." *Jackson Daily News*, May 30, 1963, p. 1).

13. From May 30, 1963, until the present time swimming and wading pools at all public parks in the City of Jackson has been closed down and inoperative with the exception of the swimming pool at Leavell Woods Park. Since May 30, 1963, white and Negro citizens of the City of Jackson have been deprived of the right to use and enjoy public bathing facilities at all City parks except at the Leavell Woods Park.

14. Affiant states that upon information and belief the Levell Woods swimming pool has been transferred, leased, or granted to private persons, in particular the Leavell Woods Community Foundation, a non-profit Mississippi Corporation, and/or the Young Men's Christian Association of Jackson, Mississippi . . . which organizations are presently operating said pool in such a way as to prevent Negro citizens including the plaintiffs herein from entering and enjoying the same. Affiant is informed and believes that defendants, acting under color of authority of the law of the State of Mississippi and City of Jackson have closed the swimming and park facilities of the City of Jackson for the sole purpose of preventing Negro citizens of the City of Jackson from enjoying the use and benefit of such facilities.

15. Affiant is further informed and believes that defendants have entered into contractual arrangements with the Young Men's Christian Association of Jackon, Mississippi and/or the Leavell Woods Community Foundation of Jackson, Mississippi. These arrangements were intended to and do have the result of permitting private organizations to operate the swimming pool at Leavell Woods Park in a racially discriminatory manner thus excluding affiant, plaintiffs and other similarly situated from the use and enjoyment of the same. Defendants' acts and conduct as alleged in the preceding paragraphs injure affiant, plaintiffs and others similarly situated as follows:

1) Public pools at Battelfield Park, College Park, Riverside Park, and Livingston Park are being permitted to fall into a state of decline and decay through non-use and improper maintenance.

2) Affiant, plaintiffs and others similarly situated in Jackson, Mississippi, are being denied access to public swimming pools at Leavell Woods Park despite the fact that said pool is being used and enjoyed by white citizens of Jackson.

3) Negro citizens of Jackson and particularly Negro children are required to seek bathing facilities in dangerous circumstances. As the result of this situation, two Negro children, Robert Kelly 14 and Melvin Houseworth 11 were recently drowned while swimming in the Pearl River because public bathing facilities and appropriate supervision was not available to them.

And further Affiant saith not.

(Jurat)

AFFIANT'S (STEVENS') EXHIBIT "A"

JACKSON DEPARTMENT OF PARKS AND RECREATION

George Kurtz, Director

Jackson, Mississippi

The Jackson Department of Parks and Recreation began a full time, year-round operation under a Director in December, 1941. Jackson had some parks prior to this time, namely. Livingston, Battlefield, Oakdale, Smith, Hospital, and Poindexter, and operated a summer program of supervised play activities on a small scale.

Operations

The department is composed of the following:

a. Municipal Auditorium

b. College Park Auditorium

c. Public Parks Community Centers and playgrounds

d. Municipal Golf Course

e. Negro Municipal Golf Course

f. Swimming Pools and Livingston Lake

g. City Concessions

h. Zoo

The Park and Recreation Department is a division of the Department of Public Works, and is one of the departments under Commissioner D. L. Luckey.

Administration

The department is under the general supervision of the Director of Parks and Recreation. The department has been operating on a full-time basis since December 1, 1945. The department does not function under a Park and Recreation Board as in many cities. Where a department operates under a Board with legal status, it is very similar to the manner in which a Board of Education operates a public school. In Jackson, the City Council, the Director of Public Works, and the Director of Parks and Recreation form the policies and determine the overall operation.

Finance

Operating Funds for the Department come from a 1 mill levy, machines, special events, and miscellaneous. From the General Fund is appropriated supplementary money needed to meet the budget in the overall operation of the Parks and Recreation Department. This, of course, includes capital expenditures. The budget is submitted by the Director of Parks and Recreation, the Superintendent of Park Maintenance, the Director of Public Works, and the Superintendent of the Zoo.

Facilities

Present facilities with brief description follows:

Livingston Park: 80.5 acres, includes picnic grounds in wooded areas, Livingston Lake swimming facility, Municipal Zoo, Municipal Rose Garden, Community Clubhouse with 30 acres of play area. Full time supervision.

Battlefield Park: 53 acres, swimming pool, community house, picnic area, large and well developed playfield including regulation baseball diamonds, 1 lighted Little

League baseball diamond, 1 lighted Babe Ruth baseball diamond, 1 lighted softball field, 3 unlighted softball fields, Tiny Tot play area, low organized activity area, 5 Rubico tennis courts, Tennis Clubhouse, 3 asphalt and 2 clay tennis courts. All parks include swings, slides, seesaws, Jungle Jims and other types of play equipment. This park is under full time supervision.

Riverside Park: 420 acres. A great deal of this park is being developed scenically. A beautiful Nature Trail is nearing completion. Now located here are 8 hard surfaced tennis courts, a large low organized play area equipped with standard apparatus, a wading pool, a beautiful swimming pool, and a picnic area. In another part of the park the high organized area is under development. There are now 3 lighted Little League diamonds, 1 Babe Ruth lighted baseball diamond, and 5 practice diamonds, and the Municipal Archery range. Softball is also featured. A Community Clubhouse is under full time supervision.

College Park: 33 acres—Negro. This beautiful park has a swimming pool, a community house, Tiny Tot lot, wading pool, picnic area, low and high organized activity area, 1 lighted softball diamond, and the Negro Municipal Auditorium, owned by the City, seats 2,400—and was erected at a cost of $500,000. This park is a full time operation and under Negro staff supervision. Adjacent to and directly north of the Negro Golf Course a 25 acre plot has been acquired for the development of a Negro park for north and northwest Jackson Negroes. Though still in drawing board plans, the park when completed will have a community house, high and low organized activity areas, a picnic area and other facilities normally found on a well developed park.

Airbase Recreation Center is another of Jackson's full time operations. Here is found a large gymnasium, with

play equipment normally found. In addition is a manual training shop, the Arts and Crafts Department, and auxiliary game rooms, At the Center is one regulation baseball diamond, one lighted softball diamond, 3 practice softball diamonds, 4 clay tennis courts, and a low organized play area. In the gymnasium is located the offices of the Supervisor of Sports & Athletics. Full time operation.

Jaycee: 2 acres—with a wading pool, community house, low organized play area. This park is under full time supervision.

In addition to the foregoing, Jackson also has Poindexter Park—6 acres; Standpipe Park— 5 acres; Capitol Park—6 acres; and Alta Woods Park—4 acres. These parks are maintained year around, and equipment kept in good condition, however, they are under supervision during summer months only.

Municipal Golf Course: This facility of the Parks and Recreation Department, embraces 200 acres, and is 6,990 yards in length. It has a beautiful clubhouse, and is under the control of the Department of Parks and Recreation. Golf fees are $.75—nine holes.

The course was officially opened for play on October 15, 1949. A Gold Professional is in charge of the course. He has all concession rights pertinent to the operation of the clubhouse, and the city pays him a salary to serve as superintendent of maintenance. Maintenance staff is on the city payroll, and all equipment belongs to the city. The Pro collects all green fees and turns them over to the city.

Negro Golf Course and New Negro Park: The city has purchased land and developed a nine hole—double tee—golf course off Livingston Road near Lake Hico. The course will open in the fall of 1960 along with the dedication of the Negro Golf Clubhouse. The course will be

under the direct supervision of a Negro Professional Golfer. This will be part of the overall operation of the Park and Recreation Department.

Program

The year round activities program of the Department falls into four major categories of operation.

Category I—Routine—This category includes all community house operations and activities, low and high organized activities found daily at all Centers and playgrounds, tennis, supervised play programs, and all other activities which occur daily or weekly. At the present time, year round operations are carried on at Battlefield Park, Livingston Park, Airbase Recreation Center, Jaycee Park, Riverside Park and College Park. Twenty-four supervised play areas were operated during the 1960 summer months—seventeen (17) whites, and seven (7) Negro.

Category II—Annual or Special Events—This category is made up of the following:

	Sponsor
(a) Annual Citywide Marble Contest (White and Negro)	VFW
(b) Annual Citywide Kite Contest (White and Negro)	Dr. J. E. Pettus
(c) Annual Easter Egg Hunt (4 parks)	Jr. League
(d) Public Parks & Playground Tennis Tournament	Department
(e) Mississippi Open Tennis Championships	Jackson Tennis Club
(f) Annual Arts & Craft Show	Department

	Sponsor
(g) Annual Golf Clinic Tournament for Beginners	Department
(h) Annual Tennis Tournament for Beginners	Department
(i) Special July 4th Programs	Department
(j) Annual Junior Activity Week	Department
(k) Annual Field and Playday Festival	Department
(l) Annual Fishing Rodeo	State Game & Fish Comm. Hinds County Conservation League & Department
(m) Annual Swimming & Diving Championships	Department
(n) Annual Pet Show and Parade	Department
(o) Annual Doll Show	Department
(p) Annual Hallowe'en Party	PTA'S Church Grps— Girl & Boy Scouts Jr. League; Clubs Department
(q) Annual Thanksgiving Dinner for old and needy Negroes	Negro Clubs & Churches
(r) Annual Christmas Party for needy Negro Children	Department
(s) Annual Christmas Carol Sing (Negroes)	Department

Category III—League Operation on Seasonal Basis

Baseball:

Senior Park League—16-18 years	Department
Morning League—13-15 years	Department
Little League—8-12 years	Servian Club
Minor Leagues—8-12 years	
Pony League—13-14 years	
Babe Ruth—13-15 years	Servian Club
American Legion—through 17	

Basketball:

Midget & Pee Wees	Department
Commerial Leagure (men)	Department
Commercial League (women)	Department

Football:

(Department cooperates by providing practice and game facilities)	
Gray—Y 9-12 years	Y. M. C. A.
Pee Wees 13-15 years	Y. M. C. A.

Softball:

Commercial League (Men)	Department
Commercial League (Women)	Department
Church League (Men)	Y. M. C. A.
Church League (Boys-14 yrs & under)	Y. M. C. A.
Playground League	Department
Negro Commercial League	Department
Midget Pee Wee League (Negro)	Negro Y. M. C. A.
Y.M.C.A.—Junior League (Negro)	Negro Y. M. C. A.

Category IV—Swimming and Golf

Swimming and golf are the only operations in the Department for which a charge is made for participation. Our $.10 and $.20 charge for swimming, and golf green fees of $.75, $1.00, and $1.25 are the lowest to be found anywhere in the country. The fees are kept low in order to serve as many people as possible.

Attendant and Participation

It is always a difficult matter to check attendance when you are unable to get a turnstile count. However, we check our attendance aggregate, participation, and spectators, in the manner prescribed by the National Recreation Association. Our total attendance annually, exclusive of swimming golf and picnic area usage, will approximate 2,000,000.

Objectives

With continued cooperation of the City Council and the lay public we in long range planning will make every effort to achieve for our Parks and Recreation program the national standards as set forth by the National Recreation Association.

AFFIANT'S (STEVENS') EXHIBIT "B"

I. *Jackson Daily News*

May 24, 1962, p.1, (quoting Mayor Thompson):

"We will do all right this year at the swimming pools", the Mayor noted, 'but if these agitators keep up their pressure, we would have five colored swimming pools because we are not going to have any intermingling." . . . He said the City now has legislative authority to sell the pools or close them down if they can't be sold.

II. *Jackson Daily News*

May 28, 1963 (quoting Mayor Thompson):

"In spite of the current agitation, the Commissioners and I shall continue to plan and seek money for additional parks for our Negro citizens. Tomorrow we are discussing with local Negro citizens plans to immediately begin a new clubhouse and library in the Grove Park area, and other park and recreational facilities for Negroes throughout the City. We cannot proceed, however, on the proposed $100,000 expenditure for a Negro swimming pool in the Grove Park area as long as there is the threat of racial disturbances."

III. *Jackson Daily News*

May 24, 1963, p. 1

"Governor Ross Barnett today commended Mayor Thompson for his pledge to maintain Jackson's present separation of the races."

IV. *Jackson Daily News*

May 25, 1963, p. 1

"Thompson said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation."

In The
UNITED STATES DISTRICT COURT
for the Southern District of Mississippi
Jackson Division

Civil Action No. 3790

Hazel Palmer, et al., *Plaintiffs,*

vs.

Allen C. Thompson, et al., *Defendants.*

(Filed August 18, 1965)

AFFIDAVIT OF GEORGE T. KURTS

United States of America
State of Mississippi
County of Hinds

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, George T. Kurts, who having been by me first duly sworn deposes and states on oath as follows, to-wit:

That he is Director of the Department of Parks & Recreation of the City of Jackson, and that he is Manager of the two city auditoriums and has occupied said positions since December 1, 1945.

Affiant denies that the public pool at either Battlefield Park or College Park or Riverside Park or Livingston Park is being permitted to fall into a state of decline and decay through nonuse or improper maintenance, and would show unto the Court that each of said pools is being properly maintained.

Affiant would further show that for the years 1960, 1961, and 1962 the average operating expense of the pools in Battlefield Park, College Park, and Riverside Park was approximately $10,000.00 each; that the average revenue from the operation of the pools at Battlefield Park and Riverside Park for said years was approximately $8,000.00 each; that the average revenue from College Park for said years was approximately $2300.00; that the City of Jackson would suffer a serious financial loss if it attempted to operate said pools, or any of them, on an integrated basis.

George T. Kurts

(Jurat)

CERTIFICATE

The undersigned counsel of record for the defendants in the above styled and numbered action hereby certifies that a true copy of the foregoing affidavit has been this day forwarded by United States Mail, postage prepaid, to Hon. Leonard W. Rosenthal, 313 E. Capital, Jackson, Mississippi, Attorney of Record for the plaintiffs.

This ... day of August, 1965.

.....

Of Counsel for Defendants

SECOND KURTS AFFIDAVIT

(Filed August 18, 1965)

[Caption Omitted]

United States of America
State of Mississippi
County of Hinds

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, George T. Kurts, who having been by me first duly sworn deposes and states on oath as follows, to-wit:

That he is Director of the Department of Parks & Recreation of the City of Jackson, and that he is Manager of the two city auditoriums and has occupied said positions since December 1, 1945.

That after the decision of the Court in the case of Clark v. Thompson, it became apparent that the swimming pools owned and operated by the City of Jackson could not be operated peacefully, safely, or economically on an integrated basis, and the City decided that the best interest of all citizens required the closing of all public swimming pools owned and operated by the City; that the City thereby decided not to offer that type of recreational facility to any of its citizens; that it has not done so and does not intend to reopen any of said pools.

That all other recreational facilities which the City makes available to its citizens have been completely desegrated and have been made available to all citizens of the City regardless of race; that this includes but is not limited to the golf courses, the playground areas, swings, see-saws, rings, and other playground facilities; that in

1961 the benches were removed from the Livingston Park Zoo, but that no other benches or tables have been removed from any other park or recreational facilities which are open to the public; that the two city auditoriums are maintained for the benefit of all citizens regardless of race, and all such citizens have free access to the use of either or both of said auditoriums; that neither of said facilities has been operated on a segregated basis since 1962; that certain facilities such as the auditoriums and club houses are, from time to time, leased to private organizations for limited use on particular occasions, but that there has been no practice or custom of limiting the leasing of same to white organizations, and that said facilities are available to any responsible private organization without regard to the race of the persons involved.

.....

(Jurat)

AFFIDAVIT OF ALLEN C. THOMPSON

(Filed August 18, 1965)

[Caption Omitted]

United States of America
State of Mississippi
County of Hinds

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, Allen C. Thompson, who having been by me first duly sworn deposes and states on oath as follows, to-wit:

That he is Mayor of the City of Jackson, which position he has held for more than sixteen years; that Jackson is a clean progressive city with approximately one-third of its citizens members of the Negro race; that Jackson had been noted for its low crime rate and lack of racial friction prior to 1961 when the self-styled freedom riders made their visits to this City. As the City rebuilt from the ashes of the Civil War, its white citizens occupied one area and its colored citizens chose to live together in another. As a result, there are large areas of the City occupied almost entirely by white people and other areas occupied exclusively by colored people. As this development took place, the City duplicated its parks, playgrounds, libraries and auditoriums in the white and colored areas. Prior to 1961 the members of each race customarily used the recreational facilities located near their homes. I believe that the welfare of both races would have best been served if this custom had continued. I fully realize that the City does not have the right to require or enforce separation of the races in any public facility. In 1961 at a time when racial tensions were inflamed by the

visits of the freedom riders to Jackson, three Negroes filed suit to enjoin the City from denying them the right to use any and all recreational facilities owned and operated by the City. The Court declined to issue an injunction and granted a declaratory judgment to the effect that the plaintiffs were entitled to the free use of any and all recreational facilities provided by the City. *Clark, et al. v. Thompson, et al.* (decided May 15, 1962), 206 F. Supp. 539, affirmed 313 F.2d 637, cert. den. 11 L.Ed.2d 312.

Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.

All other recreational facilities have been completely desegregated and have been made available to all citizens of the City regardless of race. In 1961 the benches were removed from the Livingston Park Zoo, but no other benches or tables have been removed from any other park, and all facilities of said parks and auditoriums have been and are available to all citizens of the City regardless of race.

Public rest rooms are maintained in City Hall, and same are available to all citizens regardless of race. Public rest rooms are not maintained in the Municipal Court Building for the reason that the efficient operation of said building does not permit the furnishing of these facilities for the general public.

Separate facilities and accommodations for white and Negro prisoners are maintained in the City jail. Such a separation in the jail is necessary for the maintenance of proper discipline and for the safety and protection of prisoners of both races. There is no discrimination between the races as to the quality of the facilities afforded.

.....

(Jurat)

CERTIFICATE

The undersigned counsel of record for the defendants in the above styled and numbered action hereby certifies that a true copy of the foregoing affidavit has been this day personally delivered to Hon. Leonard H. Rosenthal, Attorney of Record for the plaintiffs.

This ... day of August, 1965.

.....

Of Counsel for Defendants

UNITED STATES DISTRICT COURT

Southern District of Mississippi
Jackson, Mississippi

September 14, 1965

(Filed September 15, 1965)

Re: Hazel Palmer, et al v. Allen C. Thompson, Mayor, City of Jackson, et al
Civil Action Number 3790(J)

Dear Sirs:

This suit is for a temporary injunction to enjoin any discrimination against the plaintiffs and their race in a class action in their enjoyment of certain public facilities in Jackson, Mississippi. The application is presented on verified complaint, answer denying each material allegation thereof and affidavits of the parties and their witnesses in support of their respective contentions.

In the main, the plaintiffs say that they are discriminated against as Negroes in that they are denied the right of use of city owned and operated swimming pools; and are denied the right to use the city auditorium on South Congress Streets and are required to use the auditorium for negroes on Lynch Street; and that the jail facilities in the city jail are segregated as to race; and that the city does not provide toilet facilities in the municipal court building. These contentions are vigorously denied by the defendants except as to the jail facilities. These facilities will be discussed separately for a better understanding thereof.

The Swimming Pools

The City of Jackson closed all of its colored and white swimming pools in 1963 after the declaratory judgment of this Court was entered to the effect that they must be integrated. No pool has been opened to any citizen of either race since said time and the City Council has decided not to operate any of these pools or permit them to be used on an integrated basis. The Director states that he has reason to fear for the safety of persons using such facilities on said basis. One of the plaintiffs is a taxpayer and has two children whom she desires to use such facilities and complains of the deterioration and waste of such facilities from nonuse, but her affidavit is met by an affidavit of the Director to the effect that such facilities are not deteriorating pending a determination of the Council as to a proper disposition of them. The municipality has no duty or obligation under any statute to operate any swimming pool for any of its citizens, but recognizes its duty to integrate any pool it does operate. The evidence in this case does not show that the plaintiffs or either of them are being discriminated against because of race by reason of the decision of the Council not to operate any pool rather than operate them on integrated basis. Whether or not any pools will be provided or maintained or operated is a question committed by law to the discretion of its managing body. No constitutional right of any plaintiff is involved or impinged upon by that decision of the defendants. The evidence does not support the plaintiffs' contention as to the Leavell Woods pool which does not belong to the city but was leased by the city and that lease was terminated by the city as leasee several years ago.

Rest Rooms

The city maintains public integrated rest rooms in the City Hall but has no public rest room facilities in the Municipal Court Building. No discrimination is involved in that exercise by the municipality of its discretion in that regard. The plaintiffs have no standing in this Court to sue therefor even as taxpayers. No constitutional right of any plaintiff is violated thereby.

The Jail

The municipal jail is segregated as to race. The evidence shows that segregation of the races like segregation of the sexes in the jail is for the best interest of both parties and better comports with the management and supervision of the prisoners. That is not a question with which this Court may properly deal. A state prisoner may not properly complain to this Court and insist upon civil rights that would be his as a free citizen. Section 3374-135, Mississippi Code 1942 requires that white and black prisoners be kept separate. No attack is made by the complaint on that statute but it is mentioned in their brief for the first time. No plaintiff in this case was an inmate of the jail when this suit was filed or at any time prior to the hearing. No plaintiff thus belongs to any class having any right of action therefor and no claim for any violation of any personal right of any plaintiff is shown to exist in this connection. The claim as to this item thus is without merit. No plaintiff avers in the complaint or shows by affidavit that he has been an inmate of the jail or that he is even threatened with the enjoyment of such facilities.

The Parks

The evidence does not show that any municipal park is operated on any racially segregated basis. Benches and tables were removed from one of the parks, but the evidence does not show any discrimination against these plaintiffs by reason of their race, or that they have suffered any more or different treatment in the parks than is accorded every visitor there regardless of race. A small park on Bailey Avenue was closed by the municipality by reason of the conduct of some of the patrons or their children as detailed in the affidavit of George T. Kurts on August 17, 1965, which affords abundant just and proper cause for the closing of that park. No discrimination is involved in the closing of that park. As in the case of swimming pools, the municipality has a wide discretion which it may exercise and has properly exercised in that case. There is no merit in this claim.

Congress Street Auditorium

It is claimed that the city auditorium on Congress Street is operated on a segregated basis for the whitle people only, and that Negroes are obliged to use only the Lynch Street auditorium. There is no evidence before the Court to support that contention. The undisputed evidence on behalf of the defendants is completely to the contrary. This Congress Street auditorium is available to white people and colored people alike on the same basis with no discrimination as to race. This item of the complaint is without factual support.

In short, the plaintiffs have not shown by a preponderance of the evidence any need or necessity for an injunction, or the propriety of the issuance of an injunction by this Court under the circumstances shown. The temporary

injunction will, therefore, be refused. If the parties can agree that this hearing be treated as a hearing on the merits and if they will so stipulate, the complaint will be dismissed. A proper order or judgment may be presented for entry herein accompanied by a more detailed Finding of Facts and Conclusions of Law as required by the rules.

Yours very truly,

s/ Harold Cox

WHG:afc
Mr. Thomas Watkins
Mr. L. H. Rosenthal

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed September 18, 1965)

[Caption Omitted]

This Action came on for hearing on plaintiffs' motion for a temporary injunction against the defendants, as the Mayor, Commissioners, Chief of Police, and Director of Recreation of the City of Jackson, Mississippi. The complaint alleges that the defendants have discriminated against the plaintiffs in connection with the operation and maintenance of the public swimming pools, the auditoriums, certain public rest rooms, and the jail facilities of the City of Jackson. Specifically, plaintiffs complain because of the closing of the public swimming facilities, because of the alleged failure to furnish public rest room facilities in City Hall and in the Municipal Court Building, because of the alleged discrimination against Negroes in the use of the City auditoriums, and because of alleged separation of the races in the municipal jail. The Court has considered the verified complaint, the answer filed by the defendants, the affidavits filed by the parties, briefs submitted, and oral arguments of counsel for the respective parties.

Findings of Fact

The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of *Clark v. Thompson,* 206 F. Supp. 539, affirmed 313 F.2d 637, cert. den. 376 U.S. 951, 84 S.Ct. 440, 11 L.Ed.2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time, and the City Council does not intend to reopen or operate any of these public swimming facilities on an integrated basis. The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner. Althought closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964.

Public rest rooms are maintained in City Hall, and same are available to all citizens regardless of race. Public rest rooms are not maintained in the Municipal Court Building because the efficient operation of said building does not permit the furnishing of these facilities to the general public.

Separate facilities and accommodations for white and Negro prisoners are maintained in the City jail. Such a separation in the jail is necessary for the maintenance of proper discipline and for the safety and protection of prisoners of both races. There is no discrimination between the races as to the quality of the facilities afforded in the jail. None of the plaintiffs was an inmate of the municipal jail at the time this action was filed, and none of them has been an inmate of said jail at any time since said date.

The facilities in public parks are available to all citizens regardless of race. In 1961 the benches were removed from the Livingston Park Zoo, but no other benches or tables have been removed from any other park. There is no evidence that any municipal park is operated on a racially segregated basis. On July 14, 1964, a small park on Bailey Avenue was closed by the City because of the conduct of some of the persons using the park. Proper reasons existed for the closing of the park, and no discrimination is involved.

The two City auditoriums are maintained for the benefit of all citizens regardless of race, and all citizens have free access to the use of either or both of said auditoriums. Neither of said facilities has been operated on a segregated basis since 1962. The two City auditoriums are available to white people and colored people alike on the same basis, with no discrimination as to race. No factual basis exists which would justify the issuance of the temporary injunction prayed for.

Conclusions of Law

The plaintiffs have no constitutional right to require the City of Jackson to maintain or operate specific facilities such as swimming pools, benches in parks, or public rest rooms in any particular building. Any public facility furnished by the City would have to be available to all citizens regardless of race. As to whether any particular facility will be furnished, the City officials exercise judgment on a matter committed to their wisdom which is not subject to review by any Court in the absence of violation of constitutional rights. *City of Montgomery v. Gilmore,* U.S.C.A. 5th, 277 F.2d 564; *Lagarde v. Recreation & Park Commission,* D.C. La. 229 F.Supp. 379. No person has a constitutional right to swim in a public pool. *Tonkins v.*

City of Greensboro, D.C. N.C., 162 F.Supp. 549. Where a public facility is closed to members of all races, any issue as to discrimination becomes moot. *Clark v. Flory,* U.S.C.A. 4th, 237 F.2d 597; *Wood v. Vaughan,* D.C. Va., 209 F.Supp. 106; *Walker v. Shaw,* D.C. S.C., 209 F.Supp. 569.

The plaintiffs lack standing to enjoin the operation of jail facilities on a segregrated basis where none of them is an occupant of said facilities. *Bailey v. Patterson,* 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512; *McCabe v. Atchison T & S. F. Ry. Co.,* 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169; *Brown v. Board of Trustees,* U.S.C.A. 5th, 187 F.2d 20; *Kansas City, Mo., et al v. Williams, et al.,* U.S.C.A. 8th, 205 F.2d 47; *Clark v. Thompson,* D.C. Miss., 206 F.Supp. 539, affirmed 313 F.2d 637, cert. den. 11 L.Ed.2d 312 (376 U.S. 951, 84 S.Ct. 440.

The City is required by Section 3374-135, *Mississippi Code of 1942,* to provide separate facilities for prisoners with respect to race and sex. Federal Courts are reluctant to interfere in the administration of state prisons. *United States ex rel Wagner v. Ragen,* 7 Cir., 213 F.2d 294; *Adams v. Ellis,* 5 Cir., 197F.2d 483; *Curtis v. Jacques,* D.C., 130 F.Supp. 920; and *United States ex rel, Yaris v. Shaughnessy,* D.C., 112 F.Supp. 143. No one has a constitutional right to integrated jail facilities, and same may be operated on a segregated basis where separation is deemed necessary for the maintenance of proper discipline and for the safety of the prisoners. *Nichols v. McGee,* D.C. Calif., 169 F.Supp. 721, appeal dismissed 30 S.Ct. 90, 361 U.S. 6, 4 L.Ed.2d 12; *Bryant v. Harrelson,* D.C. Tex., 167 F.Supp. 738; *United States ex rel. Morris v. Radio Station WENR,* U.S.C.A. 7th 209 F.2d 105; and *Tabor v. Hardwick,* U.C.C.A. 5th, 224 F.2d 526.

An injunction is an extraordinary and unusual writ. *Bailey, et al v. Patterson, et al, supra.* This type of relief should be awarded only in clear cases, reasonably free from doubt, and only when necessary to prevent great and irreparable injury. *28 Am. Jur.*, Injunctions, Section 25, page 515. The plaintiffs have not shown by a preponderance of the evidence any need or necessity for an injunction, and the application for a temporary injunction is, therefore, denied.

ORDER

(Filed September 18, 1965)

[Caption Omitted]

This Action came on for hearing on the application of the plaintiffs for a temporary injunction, and the Court having fully considered the pleadings, affidavits, and authorities submitted by the parties, and being of the opinion that the plaintiffs are not entitled to the relief requested and that their application should be denied;

It is, Therefore, Ordered and Adjudged by the Court that the application of Hazel Palmer, et al, as plaintiffs in this case, for a temporary injunction be and the same is hereby denied.

It is Further Ordered and Adjuged that the Court's letter opinion of September 14th, 1965, and the Court's Findings of fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure, are made a part hereof by reference.

Ordered and Adjudged, this — day of September, 1965.

.....

United States District Judge

STIPULATION

(Filed March 26, 1966)

[Caption Omitted]

It is Hereby Stipulated and agreed by and between counsel for the plaintiffs and the defendants in the above styled and numbered action that this action be and the same is hereby submitted to the Court for final decision on the merits on the complaint, answer, and affidavits heretofore filed and submitted by the parties, and on the full and complete hearing heretofore afforded the parties, at which all parties had an opportunity to offer any and all evidence desired, and on this Court's letter opinion filed herein dated September 14, 1965, and on this Court's separate findings of fact and conclusions of law filed herein by this Court in connection with this Court's order overruling plaintiffs' application for a temporary injunction.

It is Further Stipulated and agreed that a final judgment may be entered herein on the foregoing without further hearing and without the offering of any further or additional evidence herein.

This 23rd day of March, 1966.

L. H. Rosenthal
Of Counsel for Plaintiffs
Thomas H. Watkins
Of Counsel for Defendants

FINAL JUDGMENT

(Filed March 26, 1966)

[Caption Omitted]

This Action came on for final hearing on the merits by agreement of the parties on the complaint, answer, and affidavits heretofore filed and submitted by the parties and on the full and complete hearing heretofore afforded the parties, at which all parties had an opportunity to offer any and all evidence desired, and on the stipulation of counsel for all parties dated March 23, 1966, and filed herein, and the Court finding that the plaintiffs are not entitled to any of the relief prayed for herein and that the complaint filed herein should be finally dismissed with prejudice.

It is, Therefore, Ordered, Adjudged, and Decreed that the complaint filed herein be and the same is hereby finally dismissed with prejudice with all Court costs incurred herein taxed against the plaintiffs.

It is Further Ordered, Adjudged, and Decreed that this Court's letter opinion of September 14, 1965, and its Findings of Fact and Conclusions of Law heretofore filed herein in accordance with Rule 52 of the Federal Rules of Civil Procedure be and the same are hereby made a part hereof by reference.

Ordered, Adjudged, and Decreed this — day of March, 1966.

.....

United States District Judge

Approved as to Form:

L. H. Rosenthal

Of Counsel for Plaintiffs

Thomas H. Watkins

Of Counsel for Defendants

OPINION OF COURT OF APPEALS

HAZEL PALMER et al., *Appellants,*

v.

ALLEN C. THOMPSON, Mayor, City of Jackson et al., *Appellees.*

No. 23841

United States Court of Appeals Fifth Circuit

(Filed August 29, 1967)

(Appearing in 391 F2d 324)

Before RIVES, COLEMAN and GODBOLD, Circuit Judges.

RIVES, Circuit Judge.

Twelve Negro citizens and residents of Jackson, Mississippi, on their own behalf and "on behalf of the thousands of their fellow Negro citizens and residents * * * who are similarly situated because of race and color," filed a complaint against the Mayor and Commissioners of Jackson, its Police Chief, and its Director of Recreation, seeking to enjoin their allegedly discriminatory conduct. After joinder of issue and the filing of affidavits and stipulations showing the facts, the case was submitted to the district court for final decree on its merits. The court found that the plaintiffs were not entitled to any of the relief prayed and dismissed the complaint. On appeal the plaintiffs seek review on two points stated in their brief as follows:

"*First Point*

"Where a local government closes its previously segregated public facilities to avoid a judgment declaring that Negroes have a right to use the facilities

on an integrated basis, the closing violates the equal protection clause of the Constitution of the United States and Negro residents have a cause of action against the local government to compel re-opening of the facilities. The trial court erred in denying appellants' request for injunctive relief from appellees' discriminatory closing of the pools.

"Second Point

"Segregation of the races in municipal jails is forbidden by the Fourteenth Amendment. Where segregation of public facilities is pursuant to a state statute, such statute is unconstitutional as contrary to the Fourteenth Amendment, and the trial court erred in denying appellants' request to enjoin operation of such facilities in a segregated manner."

There seems to be no dispute as to the facts; certainly the findings of fact are not clearly erroneous. Rule 52(a), Fed.R.Civil P. As to the swimming pools, the district court found the facts as follows:

"The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of *Clark v. Thompson,* 206 F. Supp. 539, affirmed 313 F.2d 637, cert. den. 376 [375] U.S. 951, 84 S.Ct. 440, 11 L.Ed2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time, and the City Council does not intend to reopen or operate any of these public swimming facilities on an integrated basis. The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could

not be economically operated in that manner. Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964."

The district court's conclusions of law relating to the operation of the swimming pools were:

"The plaintiffs have no constitutional right to require the City of Jackson to maintain or operate specific facilities such as swimming pools, benches in parks, or public rest rooms in any particular building. Any public facility furnished by the City would have to be available to all citizens regardless of race. As to whether any particular facility will be furnished, the City officials exercise judgment on a matter committed to their wisdom which is not subject to review by any Court in the absence of violation of constitutional rights. *City of Montgomery v. Gilmore,* U.S. C.A. 5th, 277 F.2d 564 [364]; *Lagarde v. Recreation & Park Commission,* D.C.La. 229 F. Supp. 379. No person has a constitutional right to swim in a public pool. *Tonkins v. City of Greensboro,* D.C.N.C., 162 F.Supp. 549. Where a public facility is closed to members of all races any issue as to discrimination becomes moot. *Clark v. Flory,* U.S.C.A. 4th, 237 F.2d 597; *Wood v. Vaughan,* D.C.Va., 209 F.Supp. 106; *Walker v. Shaw,* D.C.S.C., 209 F. Supp. 569."

[1] The appellants urge that the City may not abandon the operation of public swimming pools to prevent them from being desegrated, and that to do so is contrary to the teaching of *Mulkey v. Reitman,* 1966, 64 Cal.2d 529, 413 P.2d 825, aff'd, May 29, 1967, U.S. No. 483, Oct. Term

1966, and of *Griffin v. County School Board of Price Edward County*, 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed. 2d 256. In our opinion, the holding in neither of these two cases extends so far as to prevent the City from closing its swimming pools when they cannot be operated economically or safely as integrated pools.

The basic holding in *Mulkey v. Reitman*, according to our understanding, was that the State had become significantly involved in private discriminations against Negroes concerning residential housing. In *Griffin* the Supreme Court held that,

> "For the reasons to be stated, we agree with the District Court that, under the circumstances here, closing the Prince Edward County schools while public schools in all the other counties of Virginia were being maintained denied the petitioners and the class of Negro students they represent the equal protection of the laws guaranteed by the Fourteenth Amendment." 377 U.S. at 225, 84 S.Ct. at 1230.

The Court further held that, "Accordingly, we agree with the District Court that closing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws." 377 U.S. at 232, 84 S.Ct. at 1234. Neither those cases nor any other authority can permit a federal court to require a city to operate public swimming pools when to do so would endanger the personal safety of the city's citizens and the maintenance of law and order.[1]

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[1] We further agree with the finding of the district court that no racial discrimination was involved in the City's cancellation of its lease covering the Leavell Woods swimming pool.

The district court's findings of fact as to the City jail were as follows:

> "Separate facilities and accommodations for white and Negro prisoners are maintained in the City jail. Such a separation in the jail is necessary for the maintenance of proper discipline and for the safety and protection of prisoners of both races. There is no discrimination between the races as to the quality of the facilities afforded in the jail. None of the plaintiffs was an inmate of the municipal jail at the time this action was filed, and none of them has been an inmate of said jail at any time since said date."

The conclusions of law relating to the operation of the City jail were:

> "The plaintiffs lack standing to enjoin the operation of jail facilities on a segregated basis where none of them is an occupant of said facilities. *Bailey v. Patterson,* 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512; *McCabe v. Atchison T. & S. F. Ry. Co.,* 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169; *Brown v. Board of Trustees,* U.S.C.A. 5th, 187 F.2d 20; *Kansas City, Mo., et al. v. Williams, et al.,* U.S.C.A. 8th, 205 F.2d 47; *Clark v. Thompson,* D.C.Miss., 206 F.Supp. 539, affirmed [5 Cir.] 313 F.2d 637, cert. den. 11 L.Ed.2d 312, 376 [375] U.S. 951, 84 S.Ct. 440.
>
> "The City is required by Section 3374-135, Mississippi Code of 1942, to provide separate facilities for prisoners with respect to race and sex. Federal Courts are reluctant to interfere in the administration of state prisons. *United States ex rel. Wagner v. Ragen,* 7 Cir., 213 F.2d 294; *Adams v. Ellis,* 5 Cir., 197 F.2d 483; *Curtis v. Jacques,* D.C. 130 F.Supp. 920;

and *United States ex rel. Yaris v. Shaughnessy,* D.C. 112 F.Supp. 143. No one has a constitutional right to integrated jail facilities, and same may be operated on a segregated basis where separation is deemed necessary for the maintenance of proper discipline and for the safety of the prisoners. *Nichols v. McGee,* D.C. Calif., 169 F.Supp 721, appeal dismissed 80 S.Ct. 90, 361 U.S. 6, 4 L.Ed. 2d 52; *Bryant v. Harrelson,* D.C. Tex. 187 F.Supp. 738; *United States ex rel. Morris v. Radio Station WENR,* U.S.C.A. 7th, 209 F.2d 105; and *Tabor v. Hardwick,* U.S.C.A. 5th, 224 F.2d 526."

We agree with the district court that the appellants-plaintiffs lack standing to challenge the segregated operation of the City jail.[2] The thrust of the complaint aims at the alleged segregated operation of public recreational facilities in Hinds County, Mississippi. Appellants carefully show that they brought the "action on their behalf and on behalf of thousands of their fellow Negro citizens * * * who are racially segregated and discriminated against by the defendants * * * in the use and enjoyment of public recreational facilities in Hinds County, Mississippi."

Thereafter in the complaint, the appellants list numerous public facilities, among them parks, city auditoriums, swimming pools, and the City jail, alleging that each was operated on a segregated basis. Injunctive relief, prohibiting the segregated operation and management of each facility was requested. As noted at the beginning of this opinion, only the relief in regard to the swimming pools and the City jail is before this Court.

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[2] The law as to whether the City may racially segregate the prisoners in its jail probably will be settled when the Supreme Court decides the case of Lee v. Washington, No. 75 on its 1967-68 Appellate Docket.

[2, 3] It is clear that though standing is alleged for those persons who are discriminated against in the use of recreational facilities, there is a prayer for relief in non-recreational areas. Standing to enjoin discrimination in the operation of non-recreational facilities must be apparent from the complaint. Normally a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation. See *Barrows v. Jackson*, 1953, 346 U.S. 249, 255, 73 S.Ct. 1031, 97 L.Ed. 1586, and cases cited in footnote 3 of that opinion. That case further holds that "even though a party will suffer a direct substantial injury from application of a statute, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly infringed." *Barrows v. Jackson, supra,* at p. 256, 73 S.Ct. at 1035.

To qualify under these broad principles, a person seeking relief has been required to show "past use of the facilities, where feasible, and a right to, or a reasonable possibility of future use." *Singleton v. Board of Commissioners,* 5 Cir. 1966, 356 F.2d 771, 773, In *Bailey v. Patterson,* 1962, 369 U.S. 21, 32-33, 82 S.Ct. 549, 550, 7 L.Ed.2d 512, the Supreme Court held:

> "Appellants lack standing to enjoin criminal prosecutions under Mississippi's breach-of-peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution under them. They cannot represent a class of whom they are not a part."

In *McCabe v. Atchison, T. & S. F. R. Co.,* 1914, 235 U.S. 151, 163, 35 S.Ct. 69, 59 L.Ed. 169, the Court noted that the complaints were too vague and indefinite to warrant relief because none of the plaintiffs alleged that he was denied any rights, that he was injured in any manner, or that

he had been discriminated against on account of his race. Specifically the Court held (at p. 162, 35 S.Ct. at p. 71) that

> "The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention."

[4] The need for showing future use by the complainant is often waived where the person has been injured or aggrieved by his use of the facilities in the past. *Mitchell v. United States,* 1941, 313 U.S. 80, 61 S.Ct. 873, 85 L.Ed. 1201; *Evers v. Dwyer,* 1958, 358 U.S. 202, 79 S.Ct. 178, 3 L.Ed.2d 222; *Anderson v. City of Albany,* 5 Cir., 1963, 321 F.2d 649. What seems to be clear from the cases is (1) that the party must have been aggrieved and (2) that either he or the class of which he is a member may be aggrieved by the use of the segregated facility.

[5] The problem becomes complex when we consider desegregation of jails. Unlike recreational facilities, such as swimming pools and parks, or service facilities, such as buses, jails are not places which most people seek or normally expect to use or occupy. It seems, therefore, that the only person who presently is incarcerated or is threatened by government officials with incarceration is a person (1) who has been aggrieved and (2) who is a person or a member of a class that may be aggrieved in the future by the operation of segregated jails.

[6, 7] The language in *Evers v. Dwyer, supra,* 358 U.S. at p. 204, 79 S.Ct. at p. 179, applies to citizens in general who wish to use public facilities:

> "A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the statute which imposes the disability."

There is no need to show future use by the complainant in the situation. A prison case presents a different problem, one more properly controlled by *Bailey v. Patterson, supra.* For as Judge Tuttle noted in *Anderson v. City of Albany, supra,* 321 F.2d at 653, the Supreme Court's statement in *Bailey* that "they cannot represent a class of whom they are not a part" shows that some classes who are denied rights because of race may be limited to just certain individuals of that race. All members of the particular race are not automatically members of the deprived class simply because they are of the same race as the members of the class. *McCabe v. Atchison, T. & S. F. R. Co.,* 1914, 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169. All Negroes are not members of the class consisting of Negro prisoners and those Negroes threatened with imprisonment.[3]

[8] The appellants did not allege that they were confined in the City jail at the commencement of this action

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[3] There are exceptions to the standing rules. In exceptional circumstances, where it would be difficult, if not impossible, for persons whose rights are being denied to present their grievances to the courts, a third party may raise another's rights. Griswold v. State of Connecticut, 1965, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510; Barrows v. Jackson, 1953, 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586; Pierce v. Society of Sisters, 1925, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed 1070. This case offers no exceptional circumstances which would allow the appellants to present the grievance of those who are confined or threatened to be confined in the allegedly segregated City jail.

or have been threatened with incarceration.[4] Appellants have not shown that they are within a class whose right to a nonsegregated jail has been denied or will be denied. Certainly, pleadings may be liberally construed, Lewis v. Brautigam, 5 Cir. 1955, 227 F.2d 124, 55 A.L.R. 2d 505; Beard v. Stephens, 5 Cir. 1967, 372 F.2d 685; but here we find no foundation upon which standing as to the jail issue may be based.

The judgment of the district court is Affirmed.

JUDGMENT OF THE COURT OF APPEALS

[Caption Omitted]

(Filed Aug. 29, 1967)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof; It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Hazel Palmer, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 29, 1967

Issued as Mandate: Sept. 20, 1967

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[4] In Singleton v. Bd. of Commissioners, 5 Cir. 1966, 356 F.2d 771, 774, we carefully noted that the plaintiffs there were subject to the probationary jurisdiction of the Board of Commissioners of State Institutions and the juvenile Court:

> "The plaintiffs' probationary status brings them well within the future-use requirement for standing."

ORDER GRANTING REHEARING, EN BANC

[Caption Omitted]

(Filed October 25, 1967)

Appeal from the U. S. District Court for the Southern District of Mississippi

Before: Brown, Chief Judge; Tuttle, Wisdom, Gewin, Bell, Thornberry, Coleman, Goldberg, Ainsworth, Godbold, Dyer and Simpson, Circuit Judges.

By the Court:

The Court on its own motion having determined to rehear this case en banc,

It is ordered that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

OPINION OF COURT OF APPEALS

[Caption Omitted]

(Filed Oct. 9, 1969)

Concurring Opinion Jan. 7, 1970.

Dissenting Opinion Nov. 25, 1969.

(Appearing in 419 F.2d 1222)

RIVES, Circuit Judge:

The briefs and arguments on rehearing en banc have been confined to the first point discussed in the original opinion; that is, to whether the City of Jackson denied the equal protection of the laws to Negroes by the closing

of all of its public swimming pools. The findings of fact by the district court on this point were set forth in the original opinion, and, for convenience, are again quoted:

> "The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of *Clark v. Thompson,* 206 F. Supp. 539, affirmed 313 F.2d 637, cert. den. 376 U.S. 951, 84 S.Ct. 440, 11 L.Ed 2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time, and the City Council does not intend to reopen or operate any of these swimming facilities on an integrated basis. The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner. Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964."

On this rehearing we would observe the admonition of the Supreme Court that "generalizations do not decide concrete cases. 'Only by sifting facts and weighing circumstances' (*Burton v. Wilmington Parking Authority, supra* [365 U.S. 715], at 722 [81 S.Ct. 856, 6 L.Ed.2d 45]) can we determine whether the reach of the Fourteenth Amendment extends to a particular case." *Evans v. Newton,* 1966, 382 U.S. 296, 299, 300, 86 S.Ct. 486, 488, 15 L.Ed.2d 373.[1] So doing, we search for further facts and circumstances.

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[1] To like effect, see Reitman v. Mulkey, 1967, 387 U.S. 369, 378, 87 S.Ct. 1627, 18 L.Ed2d 830.

First, it should be noted that the district Court's findings were entered on the hearing of the plaintiffs' application for a temporary injunction. Thereafter the parties stipulated:

> "* * * that this action be and the same is hereby submitted to the Court for final decision on the merits on the complaint, answer, and affidavits heretofore filed and submitted by the parties, and on the full and complete hearing heretofore afforded the parties, at which all parties had an opportunity to offer any and all evidence desired, and on this Court's letter opinion filed herein dated September 14, 1965, and on this Court's separate findings of fact and conclusions of law filed herein by this Court in connection with this Court's order overruling plaintiffs' application for a temporary injunction.
>
> "IT IS FURTHER STIPULATED and agreed that a final judgment may be entered herein on the foregoing without further hearing and without the offering of any further or additional evidence herein."

The district Court then, upon the same findings of fact, entered final judgment that the plaintiffs are not entitled to relief. We note particularly that all parties agreed that they have "had an opportunity to offer any and all evidence desired."

In the case of *Clark v. Thompson* cited by the district Court, a declaratory judgment had been entered, "That each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson." After that decision had been affirmed per curiam by this Court and certiorari denied by the Supreme Court, the zoo, parks, and all recreational facilities except the pools were opened to the use of whites and blacks alike. The pools were closed. The only evidence as to the reasons and

motives for such closing is contained in affidavits of the Mayor and of the Director of the Department of Parks and Recreation. We quote from the Mayor's affidavit:

> "Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.
>
> "All other recreational facilities have been completely desegrated and have been made available to all citizens of the City regardless of race."

The Director's affidavit was to the same effect and was supplemented by a second affidavit stating the average annual operating expense and revenue of the pools for the years 1960, 1961 and 1962, from which it appears that there was an average annual loss of $11,700.00. The affidavit concluded: "that the City of Jackson would suffer a severe financial loss if it attempted to operate said pools, or any of them, on an integrated basis."

True, the City decided to close the pools rather than to operate them on an integrated basis. There was, however, no evidence that it reached that decision in an effort to impede further efforts to integrate. Nor did the Court find any intent to chill or slow down the integration of other recreational facilities. To the contrary, as the Mayor's affidavit states, those were completely desegregated and made available to all citizens of the City regardless of race.

The pools were closed because they could not be operated safely or economically on an integrated basis. Is that a denial of equal protection of the laws?

[1-3] If so, then the plaintiffs must prevail, for "• • • law and order are not • • • to be preserved by depriving the Negro children of their constitutional rights."[2] Desirable as is economy in government and important as is the preservation of the public peace, "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution."[3] For that principle to be applicable, however, it must be held that the result of closing the pools because they cannot be operated safely or economically on an integrated basis deprives Negroes of the equal protection of the law. In our opinion that simply is not true.

The operation of swimming pools is not an *essential* public function in the same sense as the conduct of elections,[4] the governing of a company town,[5] the operation or provision for the operation of a public utility,[6] or the operation and financing of public schools.[7]

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[2] Cooper v. Aaron, 1958, 358 U.S. 1, 16, 78 S.Ct. 1401, 1409, 3 L.Ed.2d 5, 19.

[3] Buchanan v. Warley, 1917, 245 U.S. 60, 81, 38 S.Ct. 16, 20, 62 L.Ed. 149.

[4] Nixon v. Condon, 1932, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984; Smith v. Allwright, 1944, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987; Terry v. Adams, 1953, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152.

[5] Marsh v. Alabama, 1946, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265.

[6] Public Utilities Com'n of District of Columbia v. Pollak, 1952, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068; Burton v. Wilmington Parking Authority, 1961, 365 U.S. 715, 724, 81 S.Ct. 856; Boman v. Birmingham Transit Co., 5 Cir. 1960, 280 F.2d 531; Baldwin v. Morgan, 5 Cir. 1961, 287 F.2d 750, 755.

[7] Brown v. Board of Education, 1954, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873; Guillory v. Administrators of Tulane University, E.D.La. 1962, 203 F. Supp. 855, 859, 863; Hobson v. Hansen, D.D.C. 1967, 269 F.Supp. 401.

Under the impetus of the declaratory judgment in *Clark v. Thompson, supra,* the City was making the transition in the operation of its recreational facilities from a segregated to an integrated basis. It had considerable discretion as to how that transition could best be accomplished. Local authorities have the duty of easing the transition from an unconstitutional mode of operation to one that is constitutionally permissible. That has been held true as to the reapportionment of the state legislative bodies[8] and as to the desegregation of the public schools.[9] The Constitution does, however, require that the end result be constitutionally permissible.

The equal protection clause is negative in form, but there is no denying that positive action is often required to provide "equal protection." That is frequently true as to essential public functions. Other functions permit more latitude of action. As to swimming pools, which a city may furnish or not at its discretion, it seems to us that a city meets the test of the equal protection clause when it decides not to offer that type of recreational facility to any of its citizens on the ground that to do so would result in an unsafe and uneconomical operation.

There is, of course, no constitutional right to have access to a public swimming pool. No one would question that proposition in circumstances having no racial overtones; as, for example, where all citizens of a municipality

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[8] Reynolds v. Sims, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506.

[9] Brown v. Board of Education, 1954, 347 U.S. 483, 74 S.Ct. 686; Shuttlesworth v. Birmingham Board of Education, N.D. Ala. 1958, 162 F.Supp. 372, 379, 381, aff'd 358 U.S. 101, 79 S.Ct. 221, 3 L. Ed.2d 145.

are of the same race, the closing of all municipal pools would embody no unconstitutional action or result.[10]

Attempts to analogize this case to *Reitman v. Mulkey*, 1967, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 and Griffin *v. County School Board of Prince Edward County*, 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256, offer little assistance. In *Reitman*, the Court held unconstitutional a recently adopted state constitutional amendment which declared that no agency of the state could interfere with the right of a property vendor or lessor to sell, rent or lease to anyone he chose. Considering the "purpose, scope, and operative effect" of the amendment, the Court stated that by, in effect, nullifying existing fair-housing laws, the state had adopted an affirmative policy of encouraging private discrimination. Significantly state involvement in the private housing market, by prior regulation of fair-housing practices, supported the Court's conclusion. This case offers no circumstances involving the regulation of private activity, the abandonment of which can be transmuted into discriminatory state action. It is significant further that the subject facility here, public in nature, has ceased to exist, whereas the private facilities in *Reitman*, by their very identity and nature, of necessity continued to exist. The possibility that private pool owners in Jackson may operate segregated pools henceforth does not indicate any such state involvement in the past, present or future as could possibly require the application of the *Reitman* principles here.

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[10] Arguments related to a due process or impairment of contract theory were foreclosed to plaintiffs by such cases as Hunter v. Pittsburgh, 1907, 207 U.S. 161, 177, 178, 28 S.Ct. 40, 52 L.Ed. 151. See in this regard, Gomillion v. Lightfoot, 1960, 364 U.S. 339, 342-343, 81 S.Ct. 125, 5 L.Ed.2d 110.

In *Griffin*, the Court held as a violation of the equal protection clause the closing of all of the public schools of Prince Edward County, Virginia. The Court predicated its decision on two factors. Noting that none of the other counties in Virginia had closed their schools,[11] the Court pointed out that the state and county were supporting private, segregated schools with public funds, to the effect that, excluding one temporary expedient, "Prince Edward County school children, if they go to school in their own county, must go to racially segregated schools which, although designated as private, are beneficiaries of county and state support." 377 U.S. at 230-231, 84 S.Ct. at 1233. Pretermitting the question of swimming facilities available in other parts of Mississippi, on which there is no evidence, we see no involvement here of public funds applied to maintain any private swimming facilities.

The plaintiffs rely also on *Evans v. Newton*, 1966, 382 U.S. 296, 86 S.Ct. 486, but we do not think that case analogous. There the Court found that the public character of a purportedly private park required the park to be treated "as a public institution subject to the command of the Fourteenth Amendment." 382 U.S. at 302, 86 S.Ct. at 490. "We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." 382 U.S. at 301, 86 S.Ct. at 489. In the case at bar, of course, there may well be inferred a "tradition of municipal control,"

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[11] On this point, Mr. Justice Black observed that "the Equal Protection Clause relates to equal protection of the laws 'between persons as such rather than between areas'," 377 U.S. at 230, 84 S.Ct. at 1233, but that Virginia law treated "the school children of Prince Edward [County] differently from the way it treats the school children of all other Virginia counties." Id.

but there the analogy must end. The city swimming pools in Jackson completely ceased to operate, whereas the park in *Evans v. Newton* continued to operate, with the benefit of continued "municipal maintenance and concern." 382 U.S. at 301, 86 S.Ct. 486.

Appellants have urged a theory other than those suggested explicitly by *Reitman, Griffin* and *Evans*. We understood them to argue in terms of a protected right to be a free and equal citizen. We understood counsel in oral argument, as well as by written brief, to state that the issue here is whether the Constitution forbids the City of Jackson from withdrawing a badge of equality. The badge of equality, presumably, was the ability to swim in an integrated municipal swimming pool—the ability to enjoy, in an integrated fashion, recreational facilities operated by a municipality for its citizens. It cannot be disputed that were the badge of equality, here the ability to swim in an unsegrated pool, to be replaced by a badge implying inequality—segregated pools, the municipality's action could not be allowed. However, where the facilities around which revolve the status of equality are removed from the use and enjoyment of the entire community, we see no withdrawal of any badge of equality.

[4, 5] Plaintiffs extend their argument, however, urging that white people in general are more affluent and thus have greater access to private swimming facilities.[12] Therein, it is said, lies a fatal aspect of the alleged re-

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[12] One pool formerly leased by the City has subsequently been operated by the local Y.M.C.A. on a white-only basis. There is no evidence however, of any public involvement in the operation of that pool. See, *e. g.*, Evans v. Newton, 1966, 382 U.S. 299, 302, 86 S.Ct. 486, citing Terry v. Adams, 1953, 345 U.S. 461, 73 S.Ct. 809; Public Utilities Com'n of District of Columbia v. Pollak, 1952, 343 U.S. 451, 72 S.Ct. 813; Marsh v. Alabama, 1946, 326 U.S. 501, 66 S.Ct. 276.

moval of the badge of equality—plaintiffs, and the class they represent, will continue to suffer unequal treatment as a result of municipal action. In this context, the argument carries little legal significance. The equal protection clause does not promise or guarantee economic or financial equality. In applying the requirements of the equal protection clause, this Court cannot require a city to operate a public swimming pool solely because the city's ceasing to do so forecloses the enjoyment by financially less fortunate citizens of recreational facilities available on a completely private basis to the more affluent.

[6, 7] Motive behind a municipal or a legislative action may be examined where the action potentially interferes with or embodies a denial of constitutionally protected rights. See, *e.g.*, *Griffin v. School Board of Prince Edward County, supra,* and *Gomillion v. Lightfoot, supra,* n. 10. *Griffin, supra,* 377 U.S. at 231, 84 S.Ct. 1226, at 1233, uses the expression that, "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." That expression must not be lifted out of context. Read in connection with the attached footnote, the preceding part of the paragraph, and the paragraph which follows, it is clear that the Court was speaking of the kind of abandonment of public schools which would operate to continue racial segregation. We do not read this statement to prohibit the City from taking race into consideration if not for an invidious or discriminatory purpose. The consideration of racial factors has been endorsed in cases of national defense,[13] the operation

[13] Hirabayashi v. United States, 1943, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774.

of the public schools,[14] and the selection of jurors.[15] In dismissing this complaint, after considering the affidavits and testimony, the district Court found that the City officials acted in the interest of preventing violence and preserving economic soundness to the City's operations. Even though such motive obviously stemmed from racial considerations, we know of no prohibition to bar the City from taking such factors into account and being guided by conclusions resulting from their consideration.

Motivation has been pointed out here as a positive indication of municipal policy. It has been suggested that the City has, in effect, adopted an official position that it would prefer to operate no pools rather than operate unsegregated pools. Without commenting on the soundness of the argument, we recognize that in the face of the substantial and legitimate objects which motivated the City's closing, to wit, the preservation of order and maintenance of economy in municipal activity, no such municipal policy can be inferred from the closing.

We agree with the district Court that plaintiffs were not denied the equal protection of the laws by the closing of these swimming pools.

The judgment is

Affirmed.

JOHN R. BROWN, Chief Judge, and TUTTLE, WISDOM, THORNBERRY, GOLDBERG, and SIMPSON, Judges, dissent, reserving the right to file a dissenting opinion.

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[14] Shuttlesworth v. Birmingham Board of Education, *supra*, n. 9; see also Darby v. Daniel, S.D. Miss. 1958, 168 F.Supp. 170, 186.

[15] Brooks v. Beto, 5 Cir. 1966, 366 F.2d 1, 25.

GEWIN, COLEMAN, AINSWORTH, GODBOLD and DYER, Judges, concur.

BELL, Circuit Judge, specially concurring, with whom Circuit Judges RIVES, GEWIN, COLEMAN, AINSWORTH, GODBOLD and DYER join.

The footnote at the beginning of the majority opinion shows that Judge Clayton, now deceased, had concurred on February 5, 1968. Now almost two years later, the dissenting opinion has been filed. The pools in question here were closed in 1963. The suit which forms the subject matter of this appeal was filed in 1965. There was a prompt hearing in the district Court and the judgment appealed from was rendered in 1965. The original panel decision affirming the denial of relief by the district Court was rendered on August 29, 1967. *Palmer v. Thompson,* 5 Cir., 1967, 391 F.2d 324. This is not to attribute the long delay to the parties; it is court produced. In any event, one must wonder what has happened to the pools in the long interim? Are they still in existence? If so, what condition are they in?

The final footnote[1] of the dissenting opinion shows that the differences between the majority and the dissenters are largely factual. The majority opinion had emphasized that "The only evidence as to the reasons and motives for such closing is contained in affidavits of the Mayor and of the Director of the Department of Parks and Recreation." [Majority typed opinion, p. 1225]. The majority opinion also noted particularly that "all parties agreed that they

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[1] "16 We do not say that city may never abandon a previously rendered municipal service. If the facts show that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation, and would therefore not offend the Constitution."

had 'had an opportunity to offer any and all evidence desired.' " [p. 1225] With deference, it would appear that the dissenting opinion, in making the finding that the City of Jackson acted in bad faith, simply departs from the record.[2] There is no record basis for such a finding.

Whether to operate swimming pools, racial discrimination aside, is a matter for the City of Jackson. We can easily surmise, indeed it may not be disputed, that the closings here were racially motivated. Mere racial motivation, however, is not proof of a racially discriminatory purpose in the closing. The presence or absence of such a purpose was and is the real issue. Courts, including federal courts, must travel on proof and there was a failure of proof in this case on the part of plaintiffs. We cannot assume racial discrimination simply from the fact of the closings. Constitutional principles, as important as they are, must nevertheless rest on facts. It may be that on a full hearing a factual base could be developed for the constitutional principles announced by the disenting opinion. The case is here, however, on affidavits and the necessary factual basis is absent. I, therefore, concur.

WISDOM, Circuit Judge, dissenting, joined by JOHN R. BROWN, Chief Judge, TUTTLE, THORNBERRY, GOLDBERG and SIMPSON, Circuit Judges.

WISDOM, Circuit Judge: I respectfully dissent:

Long exposure to obvious and non-obvious racial discrimination has seasoned this Court. It is astonishing, therefore, to find that half of the members of this Court accept at

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[2] Judge Rives wishes it noted that the City of Montgomery parks, contrary to footnote 14 of the dissenting opinion, are open and have been since 1965. This fact was called to the attention of the court by Judge Rives prior to the filing of the dissenting opinion.

face value the two excuses the City of Jackson offered for closing its swimming pools and wading pools. As found by the district court and blessed in the affirming opinion, these excuses are:

> "[1] The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis.
>
> [2] These pools could not be economically operated in that manner."

In Griffin v. County School Board of Prince Edward County, 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256, the School Board in Prince Edward County, Virginia, motivated by the intention of circumventing a desegregation order, as the City of Jackson was here motivated, closed the public schools in the county. The Supreme Court ordered the schools reopened. Moreover, the Court instructed the district court that it could require the County Supervisors to take the affirmative action of levying taxes to raise funds adequate to reopen and maintain the public school system. There are manifest factual differences between *Griffin* and the case before this Court: public schools in other Virginia counties stayed open; here, all municipal pools in Jackson were closed, although all other municipal recreational facilities were available on a desegregated basis. And there is a difference in the degree of essentiality between public school education and public recreational facilities—although no one today can deny that a city owes an obligation to its citizens to provide reasonably adequate recreational facilities.[1] But the rationale on which *Griffin* rest applies here:

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[1] *See* Evans v. Newton, 1966, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 45.

Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional. 377 U.S. at 231, 84 S.Ct. at 1233.

I.

A. Over fifty years ago, the Supreme Court demolished an excuse similar to the first excuse the City advances here. In Buchanan v. Warley, 1917, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, the Court invalidated an ordinance of the City of Louisville prohibiting Negroes from occupying houses in blocks where the greater number of houses were occupied by whites, and vice versa. The City urged that the ordinance "will promote the public peace by preventing race conflicts". The Court dismissed this argument with a single sentence: "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution." Over fifteen years ago, in the second *Brown*[2] decision, the Supreme Court declared: "[It] should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U.S. at 300, 75 S.Ct. at 756. Over ten years ago, the Court dealt with a similar argument in the Little Rock school case, Cooper v. Aaron, 1958, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5. After quoting Buchanan v. Warley, the Court said: "Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights." In Watson v. City of Memphis, 1963, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529, the City of

[2] 1955, 349 U.S. 294, 75 St.Ct. 753, 99 L.Ed. 1083.

Memphis sought to defend a gradual planned transition from segregated to integrated park facilities by asserting that it was necessary "to prevent interracial disturbances, violence, riots, and community confusion and turmoil," 373 U.S. at 535, 83 S.Ct. at 1319. For a unanimous Court, Mr. Justice Goldberg met this contention by asserting that the "compelling answer * * * is that constitutional rights may not be denied simply because of hostility to their assertion or exercise." Id.

In Cooper v. Aaron the district court found that there was "extreme public hostility" and that there were numerous acts of violence and disorder caused by opposition to desegregation of the schools in Little Rock. Here, there is no past history, only speculation rebutted by the existence of desegregated pools in southern cities.[3] The City of Jackson's operation of other public recreational facilities on a desegregated basis indicates that the city's law enforcement officers are able to preserve peace and that the pools were closed not to promote peace but to prevent blacks and whites swimming in the same water.

B. The second reason the City asserts for closing the pools is that "these pools could not be economically operated" on an integrated basis. At about the same time the City closed its pools, it did away with public rest rooms in the Municipal Court Building and removed the benches and tables from the Livingston Park Zoo. We are told in Mayor Thompson's affidavit, "The public rest rooms are not maintained in the Municipal Court Building for the reason that the efficient operation of said building does not permit the furnishing of these facilities for the general public". Perhaps we are also supposed to be-

[3] As the Court knows, in some cities such as Tallahassee and New Orleans, pools that had been closed have now been reopened.

lieve that benches in Livingston Park were also removed for reasons of economy and efficiency.

A study of the record shows that Jackson, like all cities, does not expect its swimming pools, wading pools, and park benches to be maintained profitably as if each recreational facility were a business independent of the facilities and activities a municipal park offers its citizens.

The Department of Parks and Recreation operates all of the parks and playgrounds in the City of Jackson. The parks have such facilities as swimming pools, wading pools, "kiddie rides", baseball diamonds, tennis courts, and similar attractions. The Department also operates the Municipal Auditorium, College Park (Negro) Auditorium, Community Centers, Municipal golf courses (including a nine-hole *Negro* golf course), Livingston Lake, city concessions, and the City Zoo. As is evident from the affidavit of George Kurts, Director of the Department, and from his itemized list of the numerous activities and facilities the Department maintains, few, if any, of the recreational activities could have been self-supporting.

For several years the pools for whites in Livingston, Battlefield Park, and College Park and the pool for Negroes in College Park had expenses for $10,000 each against revenues of $8000 each for the whitle pools and $2500 for the Negro pool. In short, the pools had never been operated economically on a segregated basis; nor were the wading pools or park benches. The City charged swimming fees of only ten cents and twenty cents, described by the Director as the "lowest to be found in the country * * * in order to serve as many people as possible."

The swimming pools and wading pools, like benches in Livingston Park, are parts of a large recreation package. In Jackson the operating funds for the Department of Parks and Recreation come from a one mill levy and from

revenue derived from certain operations such as auditorium receipts, pool and lake admissions, golf fees, concessions, kiddie rides, vending machines, and special events. And, as the Director said, "From the General Fund is appropriated supplementary money needed to meet the overall operation of Parks and Recreation".

The district court found that the "City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment [of that] court in the case of *Clark v. Thompson,* 206 F. Supp. 539 requiring integration of the City's swimming and wading pools". This Court affirmed that decision, 313 F.2d 637, and in April 1963 denied a rehearing. May 27, 1963, a committee, representing the Negro community in Jackson, met with Mayor Thompson and other city officials to present their grievances, including a request that the City desegregate its public facilities including parks and swimming pools. According to the uncontradicted affidavit of one of the Negroes present, Mayor Thompson declared that the public policy of the City of Jackson was to continue segregation of the races in the use and operation of city facilities. May 30, 1963, the Jackson Daily News reported Mayor Thompson as having announced, "Public swimming pools would not be opened on schedule this year due to some minor water difficulty". "Minor water difficulty" has disappeared as an excuse for the City's not having opened its pools in 1963 or since. The pools are still closed, except for the pool at Leavell Woods Park. They are being properly maintained—without any off-setting revenues—or were in August 1965, according to Director Kurts.

The Leavell Woods Pool, unlike the other pools, had been leased by the City. Early in 1964 the City cancelled its lease on this pool. The Young Men's Christian Asso-

ciation promply took over the leasehold and has since operated the pool exclusively for white patrons.

C. The excuse that integrated pools would pose a threat to law and order may have resulted from an honest fear held by the Jackson City Fathers. But this fear does not justify yielding to the community hostility that produces it. Yielding puts a premium on violence disorder, and further community resistance.

The excuse that the City of Jackson closed its swimming and wading pools because they could not be operated profitably is frivolous.

The City's action in closing its pools must stand or fall on a city's right to close a recreational facility on the "grounds of race and opposition to desegregation".

II.

A. My affirming brothers could not have been entirely satisfied with the reasons the City put forth for closing the swimming pools and wading ponds. They rely heavily as did the district court, on the argument that the act operated equally on Negroes and whites. They say:

> "It cannot be disputed that were the badge of equality, here the ability to swim in an unsegregated pool, to be replaced by a badge implying inequality—segregated pools, the municipality's action could not be allowed. However, where the facilities around which revolve the status of equality are removed from the use and enjoyment of the entire community, we see no withdrawal of any badge of equality."

This is a tired contention, one that has been overworked in civil rights cases. In *Griffin* the public school facilities of Prince Edward County were "removed from the use

and enjoyment of the entire community". There too the public officials argued that tuition grants as well as closing the schools, applied equally to Negroes and whites. Nevertheless the Supreme Court held that this retreat from the operation of a public facility could not be justified on grounds of race and opposition to desegregation.

In *Loving v. Virginia*, 1967, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed2d 1010, the State argued that its miscegenation statutes punish equally both the Negro and white participants in an interracial marriage. The Supreme Court "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classification from the Fourteenth Amendment's proscription of all invidious racial discrimination". In *Anderson v. Martin*, 1963, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed. 2d 430, the State defended a statute requiring that in all elections the nomination papers and ballots should designate the race of candidates. The State argued that Act was "nondiscriminatory because the labeling provision applies equally to Negro and white". The Court held that in fact the State was attempting to encourage its citizens to vote for a candidate solely on the ground of race. "Race is the factor upon which the statute operates and its involvment promotes the ultitmate discrimination which is sufficient to make it invalid." In *Hamm v. Virginia State Board of Elections*, E.D.Va.1964, 230 F.Supp. 156, aff'd *Tancil v. Woolls*, 379 U.S. 19, 85 S.Ct. 117, 13 L.Ed.2d 91 (1964), the Virginia law under attack required that lists of voters and property tax assessments be kept separately for each race. The Negroes attacking the statutes demonstrated no measureable inequality or discriminatory effect. Nonetheless the Court summarily affirmed the district court's holding the law unconstitutional.

In cases such as *Loving v. Virginia*, *Aanderson v. Martin*, and *Hamm*, the statute may have applied equally to Negroes and whites but that fact was irrelevant because race was the factor upon which the statute operated, just as race was the factor that led the City of Jackson to close its pools.

Measurable inequality was not the basis for the Supreme Court's per curiam decisions that applied *Brown* to public parks[4] and beaches,[5] municipal theatres[6] and golf courses,[7] busses[8] and courtrooms.[9] In these cases the central vice in the unlawful state action was the forced display of a racial badge of inferiority. As the first Justice Harlan put it: "[Segregation statutes] in fact proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens * * *."[10] Just as certainly as did the Jim Crow law considered in *Plessy v. Ferguson*, the swimming pool closing proceeds on the ground that

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[4] New Orleans City Park Development Ass'n v. Detiege, 1958, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46.

[5] Dawson v. Mayor and City Council of Baltimore City, 1955, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774.

[6] Muir v. Louisville Park Theatrical Ass'n, 1954, 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 1112; Schiro v. Bynum, 1964, 375 U.S. 395, 84 S.Ct. 452, 11 L.Ed.2d 412.

[7] Holmes v. City of Atlanta, 1955, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776.

[8] Gayle v. Browder, 1956, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114.

[9] Johnson v. Virginia, 1963, 373 U.S. 61, 83 S.Ct. 1053, 10 L.Ed.2d 195.

[10] Plessy v. Ferguson, 1896, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256.

Negroes are "so inferior and degraded that they cannot be allowed" to use public swimming pools with white people.

In this case, however, and in *Griffin* the equal application argument rests on the fallacious assumption that closing a public facility has the same effect on both Negroes and whites. Closing the schools in Prince Edward County had a conspicuously greater effect on Negro children than on white children. As Justice Black said:

> Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools,, and even the school they now attend is a temporary expedient. (377 U.S. at 230, 81 S.Ct. at 1233).

Here, too, closing the pools in Jackson "bears more heavily on the Negro children". Many white children in Jackson have the opportunity of swimming in country club pools or in pools owned by private persons or in pools operated at summer camps; all may swim in the Leavell Woods Pool. Few, if any Negroes in Jackson have access to a swimming pool.

In *Hall v. St. Helena Parish School Board,* E.D.La.1961, 197 F.Supp. 649, 655, aff'd 368 U.S. 515, 82 S.Ct. 529, 7 L.Ed.2d 521 (1962), the court said:

> "to speak of this law [closing the schools and providing tuition grants for students attending private schools] as operating equally is to equate equal protection with the equality Anatole France spoke of: "The law, in its majectic equality, forbids the rich as

well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[11]

B. The affirming opinion dismisses the subject of the Leavell Woods Community Park pool with the brief statement in a footnote that "There is no evidence, however, of any public involvement in the operation of that pool". After the city cancelled its lease of the pool the Negroes in Jackson suffered the humiliation of seeing the Young Men's Christian Association operate the pool for whites only. This is exactly the kind of badge of inferiority my brothers refer to as impermissible. The City's withdrawal from performing a recreational function in favor of a private, segegated operation of the same facility is similar to the State's involvement in private discrimination condemned in *Burton v. Wilmington Parking Authority,* 1961, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45. In *Burton* the Supreme Court found that the State of Delaware had elected to place its power and prestige behind the admitted discrimination against Negroes by a private restaurant in a state-owned building.

III.

We turn now to the decisions which support the plaintiffs' position.

> "[A]cts generally lawful may become unlawful when done to accomplish an illegal end and a constitutional power can not be used by way of condition to attain an unconstitutional result." *Western Union Telegraph Co. v. Foster,* 1918, 247 U.S. 105, 38 S.Ct. 438, 62 L.Ed. 1006. When, as in this case, a city closes a public facility for the purpose of avoiding a desegregation order and when the necessary effect of the city's retreat or withdrawal is to discriminate against

[11] Anatole France, Le Lys Rouge, Ch. VII (1894).

Negroes the otherwise lawful closure becomes unlawful.[12]

In *Evans v. Newton*, 1966, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373, the City of Macon, Georgia, was trustee for Bacon's Park, a park open only to white persons. The Court held that the City could not resign as trustee, abandoning the park as a public activity, to avoid integration. "A park * * * is more like a fire department or a police department that traditionally serves the community." 382

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[12] The City's argument fails to take account of the crucial distinction between the state's failure to institute a new service and its abandonment of a service it formerly provided. There are many things a state chooses not to do. When a state simply does not create one new program, or another, there is no change in the status quo. There is not "action" which could have a discriminatory impact. But when a state discontinues an existing service, clearly there is "action", and the action may well be a vehicle for discrimination. Practical as well as theoretical considerations dictate a distinction between the failure to establish a service and the abandonment of an existing one. Most important is the impact on the individual citizens. When a service has never existed there is no action to bring the state's animus home to those against whom it is directed. There is nothing to focus a generalized discriminatory atmosphere into a stinging rebuke. The impact is naturally much sharper when the state expresses its animus by taking away a previously enjoyed privilege. Then the state's discrimination is concentrated in an identifiable act. The rebuke is felt.

From the viewpoint of the city, also, it is more practical for a court to forbid the abandonment of a service than to order its original establishment. In the former case, facilities already exist, policies have been formulated, and the city already has an operative system of administration. In the latter case, the entire program must be constructed. Finally, it is more consonant with the traditional function of courts to enjoin abandonment than order a city to create and adopt an entirely new program.

In Gomillion v. Lightfoot, for example, the Court based its decision, at least in part, on the ground that the Alabama gerrymander deprived the Negro plaintiffs of something they had previously enjoyed—their "pre-existing municipal vote". 364 U.S. at 341, 81 S.Ct. 125.

U.S. at 302, 86 S.Ct. at 490. *Evans* is not distinguishable from the instant case. Considering the parks as a whole or the public recreational activities as a package, the City of Jackson should no more be allowed to abandon one phase of public recreation to avoid desegregation than the City of Macon was allowed to turn over Bacon's Park to private trustees. As the Court noted, "Mass recreation through the use of private parks is plainly in the public domain."[13] 382 U.S. at 302, 86 S.Ct. at 490 Bacon's Park in Macon would have ceased to exist too, as far as the City was concerned and as far as Negroes could use it, but for the Court's decision refusing to allow the City to retreat from its responsibility.

The Girard College case is another example of the principle that a city cannot by retreating avoid desegregating a facility. In *Commonwealth of Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia,* 1957, 353 U.S. 230, 77 S. Ct. 806, 1 L.Ed. 2d 792 the Supreme Court held that Girard College regardless of the language of the trust limiting students to white students should be desegregated. The Orphans' Court of Pennsylvania removed the City of Philadelphia as trustee and installed private persons as trustees. The Court of Appeals held that the state could not withdraw; the appointment of private trustees to continue operation of the college was unconstitutional state action. *Commonwealth of Pennsylvania v. Brown,* 3 Cir 1968, 392 F.2d 120, 25 A.L.R.3d 724.

Thus in both these cases, as in the instant case, the city government tried to escape desegregating a facility by terminating the city's connection with the facility. The

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[13] Citing Watson v. Memphis, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529.

only difference here is that the method used to accomplish the objective was closing the pools rather than withdrawing as trustee. But it is just as wrong to close public facilities for racial reasons as it is to operate them on a racial basis. In each case race is the dominant factor guiding the decision.

In *Reitman v. Mulkey*, 1967, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 the Supreme Court affirmed a California decision holding unconstitutional an amendment to the California Constitution, approved by the voters, repealing existing open housing laws and forbidding the State's interfering in the future with the absolute right of any person to sell or lease his property to any person. The amendment was neutral on its face and could be said to operate equally on Negroes and whites. The Court held that the amendment was discriminatory; that "even where the State can be charged only with encouraging rather than commanding discrimination", there was prohibited state involvement.

To find state discrimination the Court used the "three factor test" which the California Supreme Court enunciated: (1) "The historical context and the conditions existing prior to its enactment", (2) its "immediate objective", that is, its "immediate design and intent", and (3) its "ultimate effect". Applying the first factor, this Court is so familiar with the historical context and the conditions existing in Missisippi at the time the Jackson pools were closed that it is necessary only to quote from a case we decided in May 1963: "We again take judicial notice that the State of Missisippi has a steel-hard, inflexible, undeviating, official policy of segregation." *United States v. City of Jackson,* 5 Cir. 1963, 318 F.2d 1. Second, the immediate objective in closing the public pools was to avoid complying with the desegregation order issued in

Clark v. Thompson. Third, for white persons the first effect of closing the pools was to encourage private enterprise to supply segregated pools for white patrons. For Negroes the first effect was punitive: they were denied the opportunity of using even their segregated pool. The ultitmate effect is to encourage segregation to the detriment of Negroes. All public recreational facilities are now in jeopardy.

In *Hunter v. Erickson,* 1969, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616, the City of Akron, Ohio, amended its charter to prevent the city council enacting any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of voters. The Court found that this was a denial of equal protection in that "Only laws to end housing discrimination based on 'race, color, religion, national origin or ancestry' must run § 137's gauntlet." There again the City argued that all groups were treated equally. The Court said, "Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority." Thus, as in *Reitman* the court regarded the actual impact on minority groups as controlling rather than the apparent neutrality of the law.

Federal courts are used to comparable situations in the field of labor law. Time and again this Court has had to determine whether an employee was discharged for good reason, for no reason, or on account of the employee's labor union activity. In *Textile Workers of America v. Darlington Manufacturing Company,* 1965, 380 U.S. 263, 85 S.Ct. 994, 13 L.Ed.2d 827, the defendants owned several plants, in one of which employees sought to organize for collective bargaining. The defendants closed the plant in question shortly after the

employees voted in favor of unionization. The Supreme Court remanded the case to the NLRB for a factual determination of the purpose and effect of closing the plant. The company could go out of business entirely, but closing one plant was an unfair labor practice, if motivated by a purpose to chill unionism in any of the remaining plants. Here there can be no doubt of the chilling effect the closing of Jacksoon's pools had on the Negroes who presented their grievances to Mayor Thompson and on all Negroes using the parks and other public facilities. Negroes in Jackson are now on notice that a petition to redress grievances may lead to a change for the worse.

Gomillion v. Lightfoot, 1960, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed. 2d 110, involved another situation where the factual effect of racially motivated action was determinative of unconstitutionality. The Alabama legislature had redrawn the boundaries of the City of Tuskegee to exclude most of the Negro voters. The legislature has broad authority to fix and from time to time alter municipal borders. But state authority is not insulated from judicial control "when state power is used as an instrument for circumventing a federally protected right". 364 U.S. at 347, 81 S. Ct. at 130. In many cases, said Justice Frankfurter, the Court has "prohibited a State from exploiting a power acknowledged to be absolute in an isolated context". The Court held that the Fifteenth Amendment negated the state's power to redraw boundaries that did away with the Negroes' pre-existing right to vote in municipal elections.

The closing of the City's pools has done more than deprive a few thousand Negroes of the pleasures of swimming. It has taught Jackson's Negroes a lesson: In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if

they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities.

The long-range effects are manifold and far-reaching. If the City's pools may be eliminated from the public domain, parks,[14] athletic activities, and libraries also may be closed. No one can say how many other cities may also close their pools or other public facilities. The City's action tends to separate the races, encourage private discrimination, and raise substantial obstacles for Negroes asserting the rights of national citizenship created by the Wartime Amendments.

We should not be misled by the equal-application argument. That argument smacks of the repudiated separate-but-equal doctrine of *Plessy v. Ferguson*. We should not be misled by focusing on the city's non-operation of the pools. Closing the pools as an official act to prevent Negroes from enjoying equal status with whites constituted the unlawful state action. It had the same purpose and many of the same effects as maintaining separate pools.

We should recognize the actual traumatic impact of the action on Negroes for what it was. It was a reaffirmation of the *Dred Scott* article of faith that Negroes are indeed

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[14] The City of Montgomery closed its parks January 1, 1959. They are still closed. A panel of this Court held that it was "a matter committed to the wisdom of the members of the Board of Commissioners and is not subject to review by the Court in the absence of some violation of the Constitution of the United States." City of Montgomery v. Gilmore, 5 Cir. 1960, 277 F.2d 364.

"a subordinate or inferior class of beings, who had been subjugated by the dominate race" and are not members of the "people of the United States".[15] This is the badge of servitude, the sign of second-class citizenship, the stigma that the Thirteenth, Fourteenth, and Fifteenth Amendments were designed to eradicate.[16]

ADDENDUM

I err in saying that the public parks in Montgomery, which the City closed in 1959, are still closed. See footnote 2 of Judge Bell's opinion. As a matter of fact, since 1965 anyone may enjoy the trees, the flowers, the scenic beauty of the parks. But visitors to Montgomery's parks will find no animals in the City Zoo and no water in the public swimming pools.

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[15] Dred Scott v. Sanford, 1857, 69 U.S. (19 How.) 393, 15 L.Ed. 691.

[16] We do not say that a city may never abandon a previously rendered municipal service. If the facts show that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation, and would therefore not offend the Constitution.

COURT OF APPEALS

Fifth Circuit

No. 23841

JUDGMENT ON REHEARING, EN BANC

[Caption Omitted]

(Filed October 9, 1969)

This cause came on to be heard on rehearing en banc with oral argument;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the panel of this Court is affirmed.

Chief Judge Brown; Judges Tuttle, Wisdom, Thornberry, Goldberg, and Simpson, dissent reserving the right to file a dissenting opinion.

Judges Gewin, Coleman, Ainsworth and Dyer concur.

Judge Bell concurs in the result and specially reserving the right to file a concurring opinion.

October 9, 1969

Issued as Mandate: Nov. 3, 1969

Supreme Court of the United States

No. 1289 ----, *October Term, 19* 69

Hazel Palmer et al.,

Petitioners,

v.

Allen C. Thompson, Mayor, City of Jackson, et al.

ORDER ALLOWING CERTIORARI. Filed April 20 ---------- 19 70.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth ----------. Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.